NO. 46921-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRANDON ENGLISH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Barbara Johnson, Judge

AMENDED SUPPLEMENTAL BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The to-convict instructions for the robbery charges in this case omitted an essential element of the crime, and the error was not harmless.

2. The information omitted an essential element of robbery, in violation of the appellant's right to due process.

Issues Pertaining to Supplemental Assignments of Error

For a robbery to occur, the person from whom or from whose presence the property is taken must have an ownership, representative, or possessory interest in the property. This is an essential, implied element of robbery. State v. Richie, __ Wn. App. ___, ___ P 3d ____, 2015 WL 9295604, at *4 (Dec. 22, 2015).

1. Where the to-convict instructions in this case omitted this essential element, and the error was not harmless, should the appellant's robbery convictions, and the corresponding sentence enhancements, be reversed?

2. Where the information omitted an essential element of robbery, in violation of the appellant's right to due process, should the appellant's robbery convictions, and the corresponding sentence enhancements, be reversed?

B. SUPPLEMENTAL STATEMENT OF THE CASE[1]

The State charged appellant Brandon English and co-defendant Calvin Quichocho with two counts of first degree robbery (counts 1 and 2),[2] two counts of first degree kidnapping (counts 3 and 4), and two counts of second degree assault with a deadly weapon (counts 5 and 6). The State also alleged firearm enhancements as to each count. The identified complainants as to each pair of charges were Austin Bondy and Brittany Horn, who were at the apartment of their friend Colby Haugen at the time of the charged incident. CP 9-11 (charging document, attached as Appendix A). Bondy and Horn were identified as the complainants in the to-convict instructions. CP 116-17 (Instructions 13 and 14, attached as Appendix B).

---

[1] This brief refers to the verbatim reports as follows: 1RP – 10/8, 10/10, and 10/17/14; 2RP – 10/13/14; 3RP – 10/14/14 (morning); 4RP – 10/14/14 (afternoon); 5RP – 10/15/14 (morning); 6RP – 10/15/14 (afternoon); 7RP – 10/16/14 (morning); 8RP – 10/16/14 (afternoon); 9RP – 10/20/14 (morning); 10RP – 10/20/14 (afternoon); 11RP – 10/21/14 (morning); 12RP – 10/21/14 (afternoon); and 13RP – 10/22, 10/23, and 11/20/14. The volumes are consecutively and chronologically paginated with the exception of 1RP, which contains two dates.

[2] The robbery charge was elevated to the first degree by an allegation the robber displayed what appeared to be a firearm or other deadly weapon. CP 9-10; RCW 9A.56.200(1)(a)(ii).

In addition to items belonging to Bondy and Horn,[3] some of Haugen's personal property, unrelated to Bondy and Horn, was also taken in the robbery. 3RP 366-67; 4RP 447. Haugen was not home at the time of the robbery. 3RP 365.

C. SUPPLEMENTAL ARGUMENT

1. THE ROBBERY TO-CONVICT INSTRUCTIONS OMITTED AN ESSENTIAL ELEMENT OF THE CRIME, AND THE ERROR WAS NOT HARMLESS.

Essential elements of a crime are those that the prosecution must prove to sustain a conviction. State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010). In determining the essential elements, this Court first looks to the relevant statute. State v. Mason, 170 Wn. App. 375, 379, 285 P.3d 154 (2012). RCW 9A.56.190 defines robbery in the following manner:

> A person commits robbery when [he] unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

With regard to taking property from a person's *presence*, the language of the statute does not require that the person have an ownership,

[3] 4RP 447; 5RP 562.

representative, or possessory interest in the property. However, a criminal statute is not always conclusive regarding all the elements of a crime. Courts may find non-statutory, implied elements. State v. Miller, 156 Wn.2d 23, 28, 123 P.3d 827 (2005). Robbery is an example of a crime with non-statutory elements that are implied by "a near eternity of common law and the common understanding of robbery." Id.

In 1909, the state Supreme Court established that robbery includes an element that "the property must be taken from the person of the owner, or from his immediate presence, or from some person, or from the immediate presence of some person, having control and dominion over it." State v. Hall, 54 Wash. 142, 143-44, 102 P. 888 (1909). The Court held that an information alleging robbery was defective because it alleged the taking of property belonging to an entity from the immediate presence of a particular person, without alleging any connection between the person and the property. Id.

Division One adopted the requirement of ownership, representative capacity, or possession in State v. Latham, 35 Wn. App. 862, 670 P.2d 689 (1983). There, the Court stated that in order for the taking of property in the presence of a person to constitute a robbery under RCW 9A.56.190, that person must have (1) an ownership interest in the property taken, or (2) some representative capacity with respect to the owner of the property

taken, or (3) actual possession of the property taken. Latham, 35 Wn. App. at 864-65.

In Latham, two defendants assaulted a car owner and a passenger as they stood beside the car, and then the defendants stole the car. Id. at 863-64. The defendants were charged with and convicted of two counts of robbery, one relating to the owner and one relating to the passenger. Id. The Court held that the passenger could not be the victim of robbery because he was not the owner of the car, had no authority from the owner to act regarding the car, and was not in possession of the car at the time of the robbery. Id. at 866. Accordingly, the Court reversed each defendant's robbery conviction relating to the passenger. Id.

In State v. Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005), the Supreme Court approved of the characterization of the robbery element adopted in Hall and Latham. The Court stated:

> Nearly a century ago this court held that a conviction for robbery requires that the person from whom or in whose presence the property is taken have an ownership or representative interest in the property or have dominion and control over it. [Hall, 54 Wash. at 143-44]. The court rejected the argument that a conviction could be upheld where "title was not alleged in the person robbed, nor is any connection shown or alleged between the person robbed and the property taken." [Id. at 143] . . . . Thus, in order for a robbery to occur, the person from whom or from whose presence the property is taken must have an ownership, representative, or possessory interest in the

> property. [Id. at 143-44]; see also [Latham, 35 Wn. App. at 864-66].

Tvedt, 153 Wn.2d at 714.

As this Court recently held in Richie, "Hall, Latham, and Tvedt all make it clear that a defendant cannot be convicted of robbery unless the victim has an ownership, representative, or possessory interest in the property taken. *Accordingly, we hold that this requirement is an essential, implied element of robbery.*" Richie, 2015 WL 9295604, at *4 (emphasis added).

In Richie, Richie entered a Walgreen's store, removed two bottles of brandy from the shelves, and walked toward the front of the store, holding one bottle by the neck in each hand. As Richie approached, Gouveia—a store employee in line at a register, not yet on the clock, and who still wore a coat covering her uniform—took a few steps back from the checkout counter. Richie walked between the checkout counter and Gouveia. Gouveia told Richie he needed to pay and reached for the bottles. Richie hit Gouveia on the head with one of the bottles. Gouveia then grabbed for the other bottle, and Richie ran out of the front door dragging Gouveia, who was still holding on to the bottle in Richie's hand. Richie eventually broke away from Gouveia and drove off. Based on

these events, the State charged Richie with first degree robbery and second degree assault. Richie, 2015 WL 9295604, at *1.

On appeal, Richie argued there was insufficient evidence to prove all essential elements of first degree robbery because the State did not prove that Gouveia had an ownership, representative, or possessory interest in the liquor bottles that Richie stole. Id. at *4. This Court disagreed as to the sufficiency claim. The State had presented evidence that Gouveia was a Walgreens employee and she was acting in that role when she tried to stop the theft. Id. Viewing the evidence in light most favorable to the State, the jury could have found beyond a reasonable doubt that, at the time of the robbery, Gouveia was acting in a representative capacity on behalf of Walgreens. Id. at *5.

This Court found, however, that the to-convict instruction, despite corresponding to the pattern instruction, omitted the essential element of the crime.

A jury instruction is erroneous if it relieves the State of its burden to prove every element of a crime. State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003). A to-convict instruction must contain all essential elements of a crime because it serves as a yardstick by which the jury measures the evidence to determine the defendant's guilt or innocence. Id. at 910. The fact that another instruction contains the missing essential

element will not cure the error caused by the element's absence from the to-convict instruction. Id.

Under certain circumstances, the omission of an essential element of a crime from the to-convict jury instructions may, nonetheless, be subject to a harmless error analysis. State v. Schaler, 169 Wn.2d 274, 288, 236 P.3d 858 (2010). An instruction omitting an essential element may be harmless beyond a reasonable doubt if the omitted "element is supported by uncontroverted evidence." State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). However, "error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds." Schaler, 169 Wn.2d at 288.

In Richie, the trial court's to-convict instruction for first degree robbery tracked the language of the pattern instruction, WPIC 37.02.[4] The instruction stated that:

> To convict the defendant of the crime of Robbery in the First Degree, each of the following six elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 22nd day of September, 2013, the defendant unlawfully took personal property from the person or in the presence of another;

[4] 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 37.02, at 667 (3d ed. 2008).

> (2) That the defendant intended to commit theft of the property;
>
> (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person, or to the person or property of another;
>
> (4) That the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
>
> (5) That in the commission of these acts or in the immediate flight therefrom the defendant inflicted bodily injury;
>
> (6) That any of these acts occurred in the State of Washington.

Richie, 2015 WL 9295604, at *6.

This Court held the pattern instruction omitted the essential element identified above. The instructional error could be raised for the first time on appeal. Id. at *5. Moreover, this Court found the error was not harmless beyond a reasonable doubt, observing that "the evidence was ambiguous" on the issue of whether Gouveia had an ownership, representative or possessory interest in the stolen property. While the evidence was sufficient to find Gouveia was acting as a representative of Walgreens, there also was evidence that Gouveia was not on duty and should be treated like a customer rather than an employee. As a result, the instructional error was not harmless. Id. at *6.

The result is no different here. The to-convict instructions in this case, also modeled on the pattern instruction, were similarly deficient in their omission of the essential element. See Appendix B (to-convict instructions). And the evidence was similarly ambiguous. As the State argued in closing, Horn and Bondy each had their own property taken by the robbers. But, as the State also argued, items over which the named complainants had no ownership, representative, or possessory interest—such as Haugen's Xbox and change jar—were also taken from their presence. 4RP 447. The State relied on these legally inapplicable items in arguing English was guilty of robbery. 13RP 1553 (attached as Appendix C).

As in Richie, the evidence, closing argument, and instructions rendered it ambiguous as to whether the jury could have convicted on legally improper grounds. The error was not harmless beyond a reasonable doubt. Reversal is therefore required.

2. REVERSAL IS ALSO REQUIRED BECAUSE THE INFORMATION OMITTED AN ESSENTIAL ELEMENT OF ROBBERY.

A charging document must include all essential elements of a crime. U.S. Const. amend. VI; Const. art. I, § 22 (amend. 10);[5] State v. Kjorsvik, 117 Wn.2d 93, 108, 812 P.2d 86 (1991). An "essential element is one whose specification is necessary to establish the very illegality of the behavior[.]" State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992) (citing United States v. Cina, 699 F.2d 853, 859 (7th Cir.), cert. denied, 64 U.S. 991 (1983)). Essential elements may derive from statutes, common law, or the constitution. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

Where, as here, the adequacy of an information is challenged for the first time on appeal, this Court engages in a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced . . . ?" State v.

[5] U.S. Const. amend. VI provides that "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." Const. art. I, § 22 provides in part that "[i]n criminal prosecutions, the accused shall have the right to . . . demand the nature and cause of the accusation."

Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991).[6] If the necessary elements are neither found nor fairly implied in the charging document, this Court presumes prejudice and reverses without further inquiry as to prejudice. McCarty, 140 Wn.2d at 425, 428 (in prosecution for conspiracy to deliver methamphetamine, charging document, "liberally construed and subject to the Kjorsvik two-prong test, fails on its face to set forth the essential common law element of involvement of a third person outside the agreement to deliver drugs.").

Here, the charging document does not contain or imply all necessary elements. English and his co-defendant were accused of:

> [w]ith intent to commit theft, . . . unlawfully tak[ing] personal property that the Defendant did not own from the person or in the presence of [Bondy (count 1) / Horn (count 2)], against such person's will, by use or threatened use of immediate force, violence, or fear of injury . . . .

---

[6] In Kjorsvik, the Court found that "intent to steal," an essential element of robbery, could be inferred from an information that charged that Kjorsvik unlawfully, with force, and against the named complainant's will, took money while armed with a deadly weapon. "It is hard to perceive how the defendant in this case could have unlawfully taken the money from the cash register, against the will of the shopkeeper, by use (or threatened use) of force, violence and fear while displaying a deadly weapon and yet not have intended to steal the money." Kjorsvik, 117 Wn.2d at 110. That case, while involving a robbery charge, involved a different omitted element and does not control the outcome in that respect. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do not rely on cases that fail to specifically raise or decide an issue.").

CP 9-10 (Appendix A). The information thus omitted the element that the person from whom the property was taken have an ownership, representative, or possessory interest in the property. See Hall, 54 Wash. at 143 (reversing based on inadequate charging document where information charged only that "the property of the Spokane Merchants' Association . . . was taken by [Hall] from the immediate presence of" an individual).

Admittedly, Hall predates the Kjorsvik test, which permits charging documents to be construed liberally when an omission is pointed out for the first time on appeal. Thus, the State might argue that the information was adequate under a liberal reading, in that it suggested that a possessory interest ("tak[ing] . . . from the *person* . . . of") might be required. CP 9-10.

The State would be incorrect. In this respect, the information was actively misleading. One could just as easily surmise from the information that it was *not* necessary that Horn or Bondy have any possessory interest in any property taken. Indeed, based on the information, *any* property not owned by English, taken from the person or *presence of* the named complainants, would suffice.

This Court should find that the missing essential element, acknowledged by this Court in Richie, cannot be implied from such misleading and/or incomplete language.

State v. Naillieux is instructive in this respect. 158 Wn. App. 630, 241 P.3d 1280 (2010). There, the accused was charged with attempting to elude a pursuing police vehicle, and, in particular:

> fail[ing] or refus[ing] to immediately bring his . . . motor vehicle to a stop and dr[iving] his . . . vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle appropriately marked after being given visual or audible signal by a uniformed police officer.

Id. at 644.

The attempt to elude statute had been amended, however, and the charging document reflected pre-amendment language. For example, the words "reckless manner" had replaced the phrase "manner indicating a wanton or willful disregard for the lives or property of others." Id. (citing Laws of 2003, ch. 101, § 1). And "'[r]eckless manner' does not mean a 'willful or wanton disregard for the lives or property of others.'" Naillieux, 158 Wn. App. at 644 (citing State v. Ratliff, 140 Wn. App. 12, 14, 164 P.3d 516 (2007)). Rather, it meant means "'a rash or heedless manner, with indifference to the consequences.'" Naillieux, 158 Wn. App. at 644 (citing Ratliff, 140 Wn. App. at 16) (quotation marks and

citations omitted). "We, then, cannot infer 'reckless' from 'willful and wanton.'" Naillieux, 158 Wn. App. at 644.

The Court also held the requirement that the pursuing police vehicle be equipped with "lights and sirens" could not be inferred from the charging document, even though it included a requirement that the vehicle be "appropriately marked showing it to be an official police vehicle."[7] Id. at 645. The Court therefore reversed the attempt to elude conviction. Id.

Naillieux establishes that, even under a liberal reading, misleading or inaccurate language, even if it is arguably related to a missing essential element, provides insufficient notice. Cf. State v. Zillyette, 178 Wn.2d 153, 160, 307 P.3d 712 (2013) (where delivery of only certain substances supports charge of controlled substances homicide, information alleging accused delivered a controlled substance in violation of RCW 69.50.401 held to be inadequate because it alleged both prohibited and "noncriminal" behavior). This Court should reject any argument that the missing element may be inferred from the "person or presence of" language.

In summary, an "essential element is one whose specification is necessary to establish the *very illegality* of the behavior[.]" Johnson, 119 Wn.2d at 147 (emphasis added). Even under a liberal reading, the

[7] This language was also taken from the prior version of the attempt to elude statute. Former RCW 46.61.024 (1982); Laws of 2003, ch. 101, §1.

charging document failed to apprise English of all the essential elements of robbery. Because the information fails the first Kjorsvik test, reversal is required.

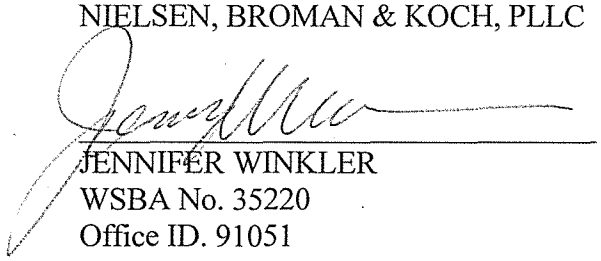
D. CONCLUSION

For the foregoing reasons, this Court should reverse the robbery convictions and the accompanying sentence enhancements.

DATED this 19TH day of January, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER
WSBA No. 35220
Office ID. 91051

Attorneys for Appellant

APPENDIX A

#6

FILED
APR 10 2014
Scott G. Weber, Clerk, Clark Co 1:45pm

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. BRANDON MICHAEL ENGLISH and CALVIN JAMES QUICHOCHO Defendant.	**AMENDED INFORMATION** No. 13-1-02318-1 **INFORMATION** No. 14-1-00672-1 (CCSO 13-14720)

COMES NOW the Prosecuting Attorney for Clark County, Washington, and does by this inform the Court that the above-named defendant is guilty of the crime(s) committed as follows, to wit:

COUNT 01 - ROBBERY IN THE FIRST DEGREE - 9A.08.020(3) /9A.56.190/9A.56.200/9A.56.200(1)(a)(ii)
That they, BRANDON MICHAEL ENGLISH and CALVIN JAMES QUICHOCHO, together and each of them, in the County of Clark, State of Washington, on or about December 4, 2013 with intent to commit theft, did unlawfully take personal property that the Defendant did not own from the person or in the presence of Austin T. Bondy, against such person's will, by use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person or the person or property of another, and in the commission of said crime or in immediate flight therefrom, the Defendant displayed what appeared to be a firearm or other deadly weapon, to-wit: a revolver; contrary to Revised Code of Washington 9A.56.200(1)(a)(ii) and/or was an accomplice to said crime pursuant to RCW 9A.08.020.

This crime is a 'most serious offense' pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(32), RCW 9.94A.030(37), RCW 9.94A.505(2)(a)(iii) and RCW 9.94A.570).

COUNT 02 - ROBBERY IN THE FIRST DEGREE - 9A.08.020(3) /9A.56.190/9A.56.200/9A.56.200(1)(a)(ii)
That they, BRANDON MICHAEL ENGLISH and CALVIN JAMES QUICHOCHO, together and each of them, in the County of Clark, State of Washington, on or about December 4, 2013 with intent to commit theft, did unlawfully take personal property that the Defendant did not own from the person or in the presence of Brittany M. Horn, against such person's will, by use or threatened use of immediate force, violence, or fear of injury to said person or the property of

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET
PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261

said person or the person or property of another, and in the commission of said crime or in immediate flight therefrom, the Defendant displayed what appeared to be a firearm or other deadly weapon, to-wit: a revolver; contrary to Revised Code of Washington 9A.56.200(1)(a)(ii) and/or was an accomplice to said crime pursuant to RCW 9A.08.020.

This crime is a 'most serious offense' pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(32), RCW 9.94A.030(37), RCW 9.94A.505(2)(a)(iii) and RCW 9.94A.570).

COUNT 03 - KIDNAPPING IN THE FIRST DEGREE - 9A.08.020(3) /9A.40.020/9A.40.020(1)(b)

That they, BRANDON MICHAEL ENGLISH and CALVIN JAMES QUICHOCHO, together and each of them, in the County of Clark, State of Washington, on or about December 4, 2013 did intentionally abduct another person, to-wit: Austin T. Bondy, with intent to facilitate the commission of any felony or flight thereafter; contrary to Revised Code of Washington 9A.40.020(1)(b) and/or was an accomplice to said crime pursuant to RCW 9A.08.020.

This crime is a 'most serious offense' pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(32), RCW 9.94A.030(37), RCW 9.94A.505(2)(a)(iii) and RCW 9.94A.570).

COUNT 04 - KIDNAPPING IN THE FIRST DEGREE - 9A.08.020(3) /9A.40.020/9A.40.020(1)(b)

That they, BRANDON MICHAEL ENGLISH and CALVIN JAMES QUICHOCHO, together and each of them, in the County of Clark, State of Washington, on or about December 4, 2013 did intentionally abduct another person, to-wit: Brittany M. Horn, with intent to facilitate the commission of any felony or flight thereafter; contrary to Revised Code of Washington 9A.40.020(1)(b) and/or was an accomplice to said crime pursuant to RCW 9A.08.020.

This crime is a 'most serious offense' pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(32), RCW 9.94A.030(37), RCW 9.94A.505(2)(a)(iii) and RCW 9.94A.570).

COUNT 05 - ASSAULT IN THE SECOND DEGREE - 9A.08.020(3) /9A.36.021/9A.36.021(1)(c)

That they, BRANDON MICHAEL ENGLISH and CALVIN JAMES QUICHOCHO, together and each of them, in the County of Clark, State of Washington, on or about December 4, 2013 did knowingly and intentionally assault Austin T. Bondy, a human being, with a deadly weapon, to-wit: a revolver; contrary to Revised Code of Washington 9A.36.021(1)(c) and/or was an accomplice to said crime pursuant to RCW 9A.08.020.

This crime is a 'most serious offense' pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(32), RCW 9.94A.030(37), RCW 9.94A.505(2)(a)(iii) and RCW 9.94A.570).

COUNT 06 - ASSAULT IN THE SECOND DEGREE - 9A.08.020(3) /9A.36.021/9A.36.021(1)(c)

That they, BRANDON MICHAEL ENGLISH and CALVIN JAMES QUICHOCHO, together and each of them, in the County of Clark, State of Washington, on or about December 4, 2013 did knowingly and intentionally assault Brittany M. Horn, a human being, with a deadly weapon, to-wit: a revolver; contrary to Revised Code of Washington 9A.36.021(1)(c) and/or was an accomplice to said crime pursuant to RCW 9A.08.020.

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET
PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261

APPENDIX B

INSTRUCTION NO. 13

To convict the defendant of the crime of robbery in the first degree as to count 1, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 4, 2013, the defendant or an accomplice unlawfully took personal property from the person or in the presence of Austin T. Bondy;

(2) That the defendant or an accomplice intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's or an accomplice's use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property;

(4) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts or in the immediate flight therefrom the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon; and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4), (5), and (6), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

To convict the defendant of the crime of robbery in the first degree as to count 2, each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 4, 2013, the defendant or an accomplice unlawfully took personal property from the person or in the presence of Brittany M. Horn;

(2) That the defendant or an accomplice intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's or an accomplice's use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property;

(4) That force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

(5) That in the commission of these acts or in the immediate flight therefrom the defendant or an accomplice displayed what appeared to be a firearm or other deadly weapon; and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4), (5), and (6), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty.

APPENDIX C

not? They know that these kids know Mr. Lujan. These kids don't know them. And they know that. So that's why the plan was changed. Bring Mr. Quichocho in. That's when the plan changes.

Now, a separate crime is charged in each count. Remember that. So your decision on one does not necessarily affect your decision on the other.

There's the definition of robbery. Commits a robbery when he or she unlawfully and with intent to commit theft. Takes personal property from the person of another or against that person's will by the use or threatened use of immediate force, violence or fear of injury to that person.

So that's what we have. We had Austin Bondy and Brittany Horn describing that. They both had items taken personally from me, as did -- there were items taken from the house. So we had Brittany Horn's purse and cell phone. We had Austin Bondy's wallet, backpack and other things. Then Colby Haugen's Xbox and some change.

So there's what I call the 'to convict instruction' for that Robbery in the First Degree. There's a -- there's a similar one for both victims. So you're going to see the exact same language in both the 'to convict instructions', the difference just being Austin Bondy or Brittany Horn.

Again, we have on or about December 4th, 2013, that the defendant or an accomplice unlawfully took personal

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
Respondent,	)	
v.	)	COA NO. 46921-9-II
BRANDON ENGLISH,	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF JANUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATE MAIL.

[X] BRANDON ENGLISH
DOC NO. 355476
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JANUARY 2016.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

January 29, 2016 - 3:45 PM

Transmittal Letter

Document Uploaded: 2-469219-Supplemental Appellant's Brief~4.pdf

Case Name: Brandon English
Court of Appeals Case Number: 46921-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Supplemental Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

CntyPA.GeneralDelivery@clark.wa.gov
Ted9@me.com